ESTATE OF REUBEN MESTETH

IBIA 87-45 Decided June 15, 1988

Appeal from an order after rehearing entered by Administrative Law Judge Elmer T. Nitzschke in Indian Probate IP RC 72Z 86-87.

Affirmed.

1. Indian Probate: State Law: Applicability to Indian Probate, Intestate Estates

   When an Indian owning land in trust or restricted status dies without a will, the trust property passes to his or her heirs as determined with reference to state laws of intestate succession.

2. Indian Probate: State Law: Applicability to Indian Probate, Testate--Indian Probate: Wills: Applicability of State Law--Indian Probate: Wills: Construction of

   The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

3. Indian Probate: Wills: Failure to Mention Child

   The failure of an Indian testator to mention his natural children in his will does not invalidate the will.

4. Indian Probate: Wills: Failure to Mention Child

   An Indian testator is not required to mention and specifically disinherit all of his potential heirs merely because he mentions and specifically disinherits one or more potential heirs.

APPEARANCES: Sanford K. Smith, Esq., Arcadia, California, for appellant; Pamela K. Putnam, Esq., Hat Springs, South Dakota, for appellees.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On August 10, 1987, the Board of Indian Appeals (Board) received a notice of appeal from Rosanna York Mesteth as guardian ad litem for her minor son, Christopher Mesteth (appellant). Appellant seeks review of a June 15, 1987, order confirming order approving will after rehearing issued in the estate of Reuben Mesteth (decedent) by Administrative Law Judge Elmer T. Nitzschke. The order let stand a September 25, 1986, order approving decedent's last will and testament. For the reasons discussed below, the Board affirms that order.

Background

Decedent, OS-7884 of the Pine Ridge Indian Reservation, South Dakota, was born October 24, 1914, and died April 17, 1985. Judge Nitzschke held a hearing to probate decedent's trust or restricted estate on August 11, 1986. At that hearing evidence was presented indicating decedent had executed a will on March 15, 1985. Under the terms of that will, decedent left all of his property to his five surviving children: Howard Roy, Nelson Dewey, Lavera Elizabeth, Verdell Wayne, and Janice Karen (appellees). If any of those named individuals predeceased him, their children were to take the share that would have gone to the parent. Decedent specifically disinherited his wife, Keva Swimmer Mesteth, because they were separated and divorce proceedings were then pending. 1/ The will did not mention decedent's previously deceased son, Paul Leon, or either of Paul's two children, Marie Paulette Black Horse and appellant.

Appellant did not appear at the August 1986 hearing. No contest to the will was raised. Accordingly, by order dated September 25, 1986, Judge Nitzschke approved decedent's will and ordered distribution of decedent's estate to his five named children. Judge Nitzschke noted that, had decedent died intestate, appellant would have been entitled to a share of the estate as the child of a previously deceased child of decedent.

On December 1, 1986, Judge Nitzschke received a petition for rehearing from appellant. As grounds for rehearing appellant alleged that he had been inadvertently omitted from decedent's will and should be allowed to take that portion of the estate to which he would have been entitled under South Dakota State law.

By order dated December 15, 1986, Judge Nitzschke stayed distribution of the estate and allowed opposing parties an opportunity to file a response to the petition. Appellees responded to the petition on January 16, 1987. A hearing on the petition was scheduled for March 25, 1987. That hearing was canceled because of inclement weather. Counsel for appellant agreed that a statement submitted by Rosanna York Mesteth constituted the evidence that would have been presented at the hearing and that a decision could be rendered on the written record.

1/ A decree of divorce was issued by the Oglala Sioux Tribal Court on Mar. 19, 1985.

On June 15, 1987, Judge Nitzschke issued an order confirming his original approval of decedent's will. The Judge found that the evidence indicated decedent was gravely ill, but able to express his intentions, when he executed the will; failure to mention a predeceased child or grandchildren was not grounds for disapproving an Indian will; and a state law providing that a child not named in the will of a parent could take as if the parent died intestate was not applicable to Indian wills.

The Board received appellant's appeal from this order on August 10, 1987. Both appellant and appellees filed briefs on appeal.

Discussion and Conclusions

On appeal, appellant appears to raise two arguments: (1) The Board has arbitrarily decided that in Indian will cases, state laws of intestate succession do not apply, 2/ and (2) Judge Nitzschke's decision fails to give effect to the intention of the testator that should any of his children predecease him, the children of that predeceased child would receive the portion of the estate to which the child would otherwise be entitled under the will.

[1, 2] Appellant first argues that there is no rational basis upon which the Board decides whether state laws of intestate succession will be applied to an Indian probate matter. This is incorrect. Under 25 U.S.C. §§ 348 and 372 (1982), 3/ the Department is required to apply the laws of intestate succession of the state in which trust or restricted lands are located when an Indian dies without having executed a will. See, e.g., Estate of Victor Blackeagle, 16 IBIA 100 (1988); Estate of Minnie May Riordan, 2 IBIA 98, 80 I.D. 728 (1973). However, under 25 U.S.C. § 373 (1982), state laws governing the construction of wills are not made applicable to Indian wills. Accordingly, the construction of Indian wills is a

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2/ The Board's reading of appellant's petition for rehearing and supporting affidavit before Judge Nitzschke and filings to the Board indicate that the state law appellant wishes to have applied in this case is the state law of intestate succession. Judge Nitzschke may have understood appellant to seek application of some unspecified state law concerning will construction which would allow a child not specifically disinherited to take his or her intestate share. In any case, appellant cites no state law other than the South Dakota law of intestate succession.

3/ Section 348 states in pertinent part: "Provided, That the law of descent and partition in the State or Territory where such lands are situated shall apply thereto after [trust] patents therefor have been executed and delivered." Section 372 states in pertinent part:

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

question of Federal, not state, law, and is governed by the decisions of this Board and any appropriate Federal court decisions. See, e.g., Estate of Roger Wilkin Rose, 13 IBIA 331 (1985); Estate of William Mason Cultee, 9 IBIA 43 (1981), aff'd sub nom., Cultee v. United States of America, No. 81-1164C (W.D. Wash. Sept. 14, 1982), aff'd, 713 F.2d 1455 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984). Therefore, the Board applies state laws of intestate succession when an Indian dies owning trust or restricted property but does not execute a will, and applies the Federal law developed concerning will construction when an Indian does execute a will.

Furthermore, even assuming that state laws could be applied in this case, state laws of intestate succession do not apply when the decedent has executed a will.

Therefore, neither state laws of intestate succession nor of will construction apply in the present case. Judge Nitzschke properly did not consider any such laws in reaching his decision approving and construing decedent's will.

Appellant's second argument is that the Department failed to carry out the decedent's wishes by not distributing his estate to the children of his predeceased son, Paul. As stated in his will, decedent devised his estate to his five then-living children. If any of those children predeceased him, he indicated that the one-fifth interest that would have gone to the predeceased child should go to that child's children. Appellant is clear in naming the individuals to whom he devised his estate and in indicating the fractional interest each of those named individuals would receive. Appellant does not specifically challenge decedent's testamentary capacity, but merely indicates that because of his illness, decedent may have understandably forgotten about Paul and his children. Appellant also argues that decedent specifically disinherited his wife, and the fact that he did not specifically disinherit Paul or himself should be seen as evidence that they were inadvertently omitted.

[3, 4] A testator is not required to name all of his potential heirs and specifically disinherit them. See Estate of Alexander Charette, 15 IBIA 92 (1987); Estate of Eastman John Kipp, 13 IBIA 242 (1985). Neither is he required to mention and specifically disinherit all potential heirs if he mentions and specifically disinherits one or more potential heirs. See Estate of Verena Gean Kitchell, 12 IBIA 258, 263 n.5 (1984).

Under the Supreme Court's ruling in Tooahnippah v. Hickel, 397 U.S. 598 (1970), the Department is not free to substitute its judgment for that of an Indian testator when a will executed in conformity with Departmental regulations evidences a rational testamentary scheme. See Cultee, supra. In this case, decedent clearly indicated his desire that his estate should go to his five then-living children or their children should any of his five named children predecease him. There is no evidence whatsoever that he intended Paul's children to take any part of his estate. The Department is not free to rewrite decedent's will in order to include appellant contrary to the expressed intention of decedent. The fact that decedent specifically

disinherited his wife is not evidence that he did not intend to also disinherit appellant.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 15, 1987, decision of Judge Nitzschke is affirmed.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge